

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D32013
Y/prt

_____AD3d_____

Argued - May 10, 2011

DANIEL D. ANGIOLILLO, J.P.
ANITA R. FLORIO
ARIEL E. BELEN
SHERI S. ROMAN, JJ.

2010-03899

DECISION & ORDER

Solomon Ryles, et al., appellants, v City of Newburgh,
et al., respondents.

(Index No. 3118/08)

Douglas R. Dollinger, Goshen, N.Y., for appellants.

Tarshis, Catania, Liberth, Mahon & Milligram, PLLC, Newburgh, N.Y. (Nicholas A. Pascale of counsel), for respondent City of Newburgh.

Monte J. Rosenstein, P.C., Middletown, N.Y., for respondent William Cummings.

In an action, inter alia, to recover damages for the revocation of a building permit, the plaintiffs appeal from an order of the Supreme Court, Orange County (Ritter, J.) dated February 17, 2010, which granted the motion of the defendants City of Newburgh, Newburgh City Manager Jeanann McGrane, and Newburgh City Building Department for summary judgment dismissing the complaint insofar as asserted against them and granted the cross motion of the defendant William Cummings for summary judgment dismissing the complaint insofar as asserted against him.

ORDERED that the order is modified, on the law, by deleting the provision thereof granting the motion of the defendants City of Newburgh, Newburgh City Manager Jeanann McGrane, and Newburgh City Building Department for summary judgment dismissing the complaint insofar as asserted against them and substituting therefor a provision denying the motion; as so modified, the order is affirmed, with one bill of costs to the defendant William Cummings payable by the plaintiffs and one bill of costs to the plaintiffs payable by the defendants City of Newburgh, Newburgh City Manager Jeanann McGrane, and Newburgh City Building Department.

July 26, 2011

Page 1.

RYLES v CITY OF NEWBURGH

The defendant William Cummings established his prima facie entitlement to judgment as a matter of law dismissing of the complaint insofar as asserted against him. In response, the plaintiffs failed to raise a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324; *Zuckerman v City of New York*, 49 NY2d 557, 559). However, contrary to the Supreme Court's holding, the defendants City of Newburgh, Newburgh City Manager Jeanann McGrane, and Newburgh City Building Department (hereinafter collectively the Newburgh defendants) failed to sustain their burden of making a prima facie showing of entitlement to judgment as a matter of law. The evidence submitted in support of their motion for summary judgment, which included the deposition testimony of the plaintiff Solomon Ryles and the defendant William Cummings, presented triable issues of fact as to whether a building permit was properly and validly issued to the plaintiffs in the first instance (*see Town of Orangetown v Magee*, 88 NY2d 41; *Matter of Parkview Assoc. v City of New York*, 71 NY2d 274, 282, *cert denied* 488 US 801). The failure to make a prima facie showing eliminating those issues of fact required the denial of the motion, regardless of the sufficiency of the opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853).

Accordingly, the Supreme Court correctly granted Cummings's cross motion for summary judgment, but should have denied the Newburgh defendants' motion for summary judgment.

ANGIOLILLO, J.P., FLORIO, BELEN and ROMAN, JJ., concur.

ENTER:

A handwritten signature in black ink that reads "Matthew G. Kiernan". The signature is written in a cursive, slightly slanted style.

Matthew G. Kiernan
Clerk of the Court